

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JENNIFER BRADLEY

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Plaintiff

*

v.

*

**Case No: 1:16-CV-00346 (RBW)
Judge Reggie B. Walton**

NCAA, et al

*

Defendants

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**DEFENDANT THE AMERICAN UNIVERSITY'S REPLY TO PLAINTIFF'S
OPPOSITION TO MOTION IN LIMINE TO EXCLUDE PLAINTIFF'S EXPERTS'
TESTIMONY REGARDING ATHLETIC TRAINER DASH**

COMES NOW the Defendant, THE AMERICAN UNIVERSITY, by and through its counsel, John J. Murphy and Walker, Murphy & Nelson, LLP and, pursuant to the Federal Rules of Civil Procedure and this Honorable Court's Scheduling Order, hereby files this short Reply to Plaintiff's Opposition to Motion in Limine to Exclude Plaintiff's Experts From Testifying as to any alleged negligence on the part of the University's Head Athletic Trainer, Sean Dash.

1. Plaintiff's Opposition does not oppose any of the undisputed facts set forth in Defendant's original Motion. *ECF 81-1 at p. 1.*

2. Plaintiff's Opposition is confounding in that she appears to argue there is no claim that Mr. Dash was negligent for not diagnosing a concussion but, rather, was somehow negligent with respect to American University's concussion management policy. *Id. at pp. 3-4.* Yet when Dr. Cantu was asked at his deposition on June 6, 2018 whether, "broadly ... are you of the opinion

that any athletic trainer at American University breached any applicable standards of care?" he did not as set forth in Defendant's original motion. *ECF 76.*

3. If Plaintiff is now asserting that there was some negligence on the part of Mr. Dash (or anyone else at American University) regarding the implementation of the concussion management protocol, Plaintiff's expert expressly disavowed any such opinion as well. Specifically, Dr. Cantu acknowledged at deposition that American University had an appropriate concussion management plan in place which was being followed. *See, Deposition Testimony of Cantu, excerpts attached hereto as Exhibit 1 at pp. 30 and 47.*

4. Not only did Dr. Cantu acknowledge that American University had an appropriate concussion management plan in place, but he further acknowledged that there is no standard for what to do when an individual is *not* diagnosed with a concussion – the precise scenario that occurred in the case at bar. *Id. at pp. 30-31.*

5. Plaintiff's claim that "Dr. Cantu laid out his opinions for all the world to see and read as pertains to institutional failures at American University that Mr. Dash implemented and was in control of" is simply false. *ECF 81-1 at p. 6.* Dr. Cantu expressly disavowed any such opinions against Mr. Dash specifically and/or American University's concussion management plan or its implementation in general at his deposition. Having failed to provide an Affidavit or any other admissible evidence from Dr. Cantu to the contrary, Defendant's Motion in Limine should be granted.

6. Granting this Motion will help limit Plaintiff's claims and focus a jury on the actual opinions espoused by Dr. Cantu should Plaintiff's claims survive Defendants' numerous Motions for Summary Judgment.

Respectfully submitted,

WALKER, MURPHY & NELSON, LLP

/S/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Opposition to Motion in Limine to Exclude Testimony Regarding Sean Dash's was served electronically this ____ day of February 2019 to:

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EXHIBIT 1

ROBERT CANTU, M.D.
BRADLEY vs NATIONAL COLLEGIATE ATHLETIC ASSOC.

June 06, 2018
29-32

Page 29	Page 31
<p>1 I've never seen a survey published of that.</p> <p>2 But it's obvious that at many schools, the</p> <p>3 physician involved -- physician responsible was</p> <p>4 not seeing the patient.</p> <p>5 In this particular case here, I realize</p> <p>6 that it was Dr. Williams that actually saw the</p> <p>7 patient. But Dr. Higgins, who's ultimately the</p> <p>8 team physician for this university, said he'd</p> <p>9 seen one concussion.</p> <p>10 "And by the way, I'm an orthopedist, and I</p> <p>11 wouldn't treat him, anyway." Well, that's</p> <p>12 suggesting that certainly not a high percentage</p> <p>13 were going in his direction.</p> <p>14 Q. I will -- I don't want to tread on counsel for</p> <p>15 Dr. Higgins, so I'll let him ask follow-up</p> <p>16 questions on that. I'm going to stick to</p> <p>17 American University's training staff for now,</p> <p>18 Doctor.</p> <p>19 A. Yes, sir.</p> <p>20 Q. What is your understanding as to athletic</p> <p>21 trainers' responsibility to follow physician</p> <p>22 orders?</p> <p>23 A. They are responsible for following physician</p> <p>24 orders, and they're responsible for following</p> <p>25 protocol that the university has agreed is the</p>	<p>1 might occur. But, basically, if one has seen</p> <p>2 an individual and excluded them from having a</p> <p>3 concussion, that serial follow up would not</p> <p>4 necessarily be routine.</p> <p>5 Q. (By Mr. Murphy) What role does the student</p> <p>6 athlete have in timely reporting signs and</p> <p>7 symptoms of a concussion?</p> <p>8 MR. NACE: Objection.</p> <p>9 THE WITNESS: Well, it would be the hope</p> <p>10 that an athlete would be educated about what</p> <p>11 the signs and symptoms of concussion are. And</p> <p>12 it would be the hope that if the athlete had</p> <p>13 these symptoms, either acutely at the time of</p> <p>14 head trauma or, as is not uncommon with</p> <p>15 concussion, the symptoms were delayed in their</p> <p>16 onset, that the athlete would report them.</p> <p>17 Unfortunately, that's not uniformly what</p> <p>18 happens, but it's happening to a greater degree</p> <p>19 now than it was ten years ago.</p> <p>20 Q. (By Mr. Murphy) When the concussive symptoms</p> <p>21 persist, when do you typically try to get MRI</p> <p>22 or CT imaging to help with your diagnosis?</p> <p>23 A. Well, MRI and CT imaging don't help with your</p> <p>24 diagnosis of concussion, so it's not done for</p> <p>25 that purpose. MRI and CT imaging with</p>
Page 30	Page 32
<p>1 way they're going to handle certain situations.</p> <p>2 Like, the NCAA has a requirement from 2010</p> <p>3 going forward. Therefore, that included 2011.</p> <p>4 And American University correctly followed that</p> <p>5 protocol and had a concussion management</p> <p>6 protocol, and I would expect the athletic</p> <p>7 trainer would follow that protocol.</p> <p>8 Q. To your knowledge, are there any concussion</p> <p>9 management protocols that exist for what to do</p> <p>10 when a student athlete is not diagnosed with a</p> <p>11 concussion?</p> <p>12 MR. NACE: Objection.</p> <p>13 Matt Mace.</p> <p>14 THE WITNESS: No, I'm not aware of</p> <p>15 protocols for that. We're all aware that a</p> <p>16 great number of concussions are missed on the</p> <p>17 athletic field. Depending upon whose research</p> <p>18 you want to cite, it could be as many as</p> <p>19 50 percent or even higher of minor concussions.</p> <p>20 And so clearly, concussions that are not</p> <p>21 diagnosed -- there isn't a clear-cut protocol</p> <p>22 for following those.</p> <p>23 For individuals that are being assessed</p> <p>24 for possible concussion, there are guidelines</p> <p>25 and recommendations that serial assessment</p>	<p>1 concussion is going to be normal because that's</p> <p>2 a macroscopic study, and concussion is both a</p> <p>3 metabolic injury and, in many cases, a</p> <p>4 microscopic structural injury. But you won't</p> <p>5 see it on MRI or CT.</p> <p>6 So you get an MRI or CT when you're</p> <p>7 worried about some other life threatening</p> <p>8 process being present, like an intracranial</p> <p>9 bleed or some other process being there that's</p> <p>10 explaining the symptoms not clearing up.</p> <p>11 Q. All right.</p> <p>12 Doctor, let's switch gears a little bit.</p> <p>13 I want to talk about your understanding of the</p> <p>14 actual facts in this case; okay?</p> <p>15 A. Yes, sir.</p> <p>16 Q. Great. Let's start with the plaintiff's</p> <p>17 history prior to American University.</p> <p>18 To your knowledge, did she ever sustain</p> <p>19 any concussions?</p> <p>20 A. I don't think I have a detailed history that</p> <p>21 antedates American University. I'm not aware</p> <p>22 that she did. It could have happened.</p> <p>23 Q. Is a history of concussions important in</p> <p>24 predicting how one is going to respond to</p> <p>25 future concussions?</p>

ROBERT CANTU, M.D.
BRADLEY vs NATIONAL COLLEGIATE ATHLETIC ASSOC.

June 06, 2018
45-48

Page 45	Page 47
<p>1 aware of is the date of the SCAT2 examination.</p> <p>2 Q. Okay. So, then, this may shorten up my</p> <p>3 questions considerably. Let me ask you</p> <p>4 broadly.</p> <p>5 As you sit here today, are you of the</p> <p>6 opinion that any athletic trainer at American</p> <p>7 University breached any applicable standards of</p> <p>8 care?</p> <p>9 MR. NACE: Objection.</p> <p>10 THE WITNESS: I believe that the athletic</p> <p>11 training staff at American University evaluated</p> <p>12 Jennifer and put her through a reasonable</p> <p>13 assessment for an athletic trainer, meaning the</p> <p>14 SCAT2 as of 2011. And abnormalities were found</p> <p>15 on that test, and it was reasonable that they</p> <p>16 did refer Jennifer on to Dr. Williams.</p> <p>17 And at that point up through right where</p> <p>18 we are now, on the 4th and the 5th, I don't</p> <p>19 have a problem with the care that the athletic</p> <p>20 trainers provided for Jennifer.</p> <p>21 Q. (By Mr. Murphy) Okay. And, like I said,</p> <p>22 that's going to help shorten at least my part</p> <p>23 of this deposition up considerably. Let me ask</p> <p>24 sort of a follow-up question to that.</p> <p>25 I believe, if I have my information</p>	<p>1 trainer, I think the trainer should have pushed</p> <p>2 harder to get further assessment. Because that</p> <p>3 wasn't a reasonable decision on Dr. Williams'</p> <p>4 part, and the athletic trainer should have</p> <p>5 understood that it's not reasonable.</p> <p>6 But the athletic trainer does work under</p> <p>7 Dr. Williams, so I'm not holding that to be a</p> <p>8 standard of care.</p> <p>9 Q. I think you said this in your report, but I</p> <p>10 want to make sure.</p> <p>11 You don't have any problems or objections</p> <p>12 to the actual concussion management plan in</p> <p>13 place at American University, do you?</p> <p>14 MR. NACE: Objection.</p> <p>15 THE WITNESS: I think I do remember</p> <p>16 reading it. I don't sit here today and</p> <p>17 remember it word for word. I'm not sitting</p> <p>18 here criticizing that.</p> <p>19 I do remember from the depositions of</p> <p>20 multiple people that that plan said if a</p> <p>21 concussion is diagnosed, the individual should</p> <p>22 be removed until symptoms have cleared, or at</p> <p>23 least until they're back to baseline. And then</p> <p>24 an exertional protocol -- that is all</p> <p>25 reasonable and appropriate.</p>
Page 46	Page 48
<p>1 correct, that it was October 5th when</p> <p>2 Dr. Williams saw the plaintiff. And I'll let</p> <p>3 his counsel ask questions about Dr. Williams.</p> <p>4 Specific to the athletic trainers, do you</p> <p>5 have any standard of care opinions against the</p> <p>6 athletic trainers once the plaintiff was seen</p> <p>7 by Dr. Williams -- from that point going</p> <p>8 forward?</p> <p>9 A. Yeah, I'm not an athletic trainer, and we don't</p> <p>10 render standard of care opinions about athletic</p> <p>11 trainers across the field. I render standard</p> <p>12 of care opinions about assessments for a</p> <p>13 concussion, though, when that might involve an</p> <p>14 athletic trainer, and when that might involve a</p> <p>15 physician.</p> <p>16 The person that I have the most criticism</p> <p>17 for in this case is Dr. Williams. And we'll</p> <p>18 get to that, obviously.</p> <p>19 But when Dr. Williams used, "I can't</p> <p>20 identify a mechanism," as an excuse to limit</p> <p>21 concussion as a diagnosis, when all the</p> <p>22 symptoms were consistent with concussion, when</p> <p>23 it came after the night of a game in which she</p> <p>24 sustained head trauma, when that head trauma is</p> <p>25 on the SCAT2 form, documented by the athletic</p>	<p>1 Q. Have we now -- well, I guess, as I understand</p> <p>2 your testimony, Doctor, you're not going to</p> <p>3 render the opinion that anyone at American</p> <p>4 University athletic training staff violated,</p> <p>5 quote, unquote, "Standards of care."</p> <p>6 Is that -- to be as broad as possible, is</p> <p>7 that fair?</p> <p>8 MR. NACE: Objection.</p> <p>9 THE WITNESS: No. No, it's not.</p> <p>10 In my opinion, Dr. Williams violated</p> <p>11 standard of care. And in my opinion,</p> <p>12 Dr. Higgins, as a responsible individual for</p> <p>13 the medical care being provided and, therefore,</p> <p>14 that Dr. Williams was doing the right thing, is</p> <p>15 responsible as well.</p> <p>16 Q. (By Mr. Murphy) Okay. And I'm sorry if I</p> <p>17 misphrased that. I was kind of limiting my</p> <p>18 question, again, to the athletic trainers at</p> <p>19 American University. Let me ask you this</p> <p>20 question.</p> <p>21 Do you have any criticism of any of the</p> <p>22 subsequent treating healthcare providers? And</p> <p>23 I'll start with the folks at Georgetown and the</p> <p>24 ENT.</p> <p>25 MR. NACE: Objection.</p>

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**Case No: 1:16-CV-00346 (RBW)
Judge Reggie B. Walton**

NCAA, et al

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Defendants

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PROPOSED ORDER

UPON CONSIDERATION of Defendant's Motion in Limine to Exclude Plaintiff's Experts' Testimony Regarding Dash's, and any opposition thereto, it is this _____ day of _____, 2018, by the United States District Court for the District of Columbia hereby:

ORDERED that Defendant's Motion in Limine to Exclude Testimony Regarding Sean Dash's Negligence be and hereby is GRANTED; and, it is further

ORDERED that Plaintiff's Expert's Testimony regarding Sean Dash's alleged negligence be and hereby is STRICKEN.

Judge Reggie B. Walton

United States District Court for the District of Columbia.